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No. 08-1019

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IN THE
Supreme Court of the United States

CELSA HILAO, *ET AL.*,

Petitioners,

v.

REVELSTOKE INVESTMENT CORPORATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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March 10, 2009

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QUESTION PRESENTED

Whether the court of appeals correctly applied Hawaii law in determining that a final judgment rendered by the United States District Court for the District of Hawaii expired and became unenforceable where no extension of the judgment was sought or granted within the ten-year limitations period imposed by Haw. Rev. Stat. § 657-5.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Revelstoke Investment Corp., Inc. is a privately held Delaware corporation. No publicly held company owns 10% or more of its stock. Its parent company is Western Pacific Investment Corp.

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INTRODUCTION

The court of appeals unanimously decided that a final judgment in favor of petitioners entered in February 1995 (the "1995 Class Judgment") expired in February 2005 under Haw. Rev. Stat. § 657-5, which imposes a strict 10-year limit for enforcing judgments that are not "extended" before expiration. The court of appeals based its ruling on the express terms of the Hawaii statute, decisions applying it, and the long-accepted principle that state limitations periods apply in the absence of a federal law supplying a deadline.

Petitioners identify no issue worthy of this Court's review. The dispositive question decided by the court of appeals — and fully addressed by the parties below — is the straightforward application of Hawaii's time limit for enforcing judgments. Petitioners themselves tendered that issue to the federal district court in Hawaii, and they never sought to certify the question to the Hawaii state courts. Now, however, petitioners ask this Court to "defer or hold decision on this Petition" (Pet. 4, 19-23, Question Presented 2) while they seek in another case to relitigate the same issue — which their counsel asked the district court to "certify" to the Supreme Court of Hawaii after the court of appeals rejected their position below. The petition, in short, not only raises questions of state law that are inappropriate for review by this Court, but also misuses the certiorari procedure as a tactic for relitigation and delay.

Nor are the supposed questions of federal law identified in the petition (*see* Questions Presented 1 and 3) worthy of review. Neither question was

presented to or decided by the courts below. Question 1, whether federal law rather than state law determines when a federal judgment "accrues" for "sunsetting purposes" (Pet. 11), is not the subject of any conflicting decisions of the circuits or any contradiction with this Court's decisions. And Question 3, whether the 1995 Class Judgment was truly a "final judgment," turns on a fact-bound argument and borders on the frivolous: Petitioners consistently (and correctly) treated the 1995 Class Judgment as a final judgment and enforced it as such from February 1995 onward; the court of appeals held that the judgment was final for purposes of appellate review upon entry and affirmed it in 1996; it was entered as a final judgment in the docket of the Hawaii district court in accordance with FRCP 58; and the result in this case would be the same even if petitioners prevailed on this issue.

STATEMENT

1. ***The Parties.*** Petitioners are plaintiffs in *Hilao v. Estate of Ferdinand Marcos* (Civ. A. No. 86-0390, D. Haw.), a class action alleging violations of the Alien Tort Claims Act, 28 U.S.C. § 1350. This class action was among a number of cases against the former President of the Philippines that were handled under multi-district litigation procedures in *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840 (D. Haw.). On February 3, 1995, the Hawaii district court (Judge Real) entered the 1995 Class Judgment in favor of petitioners in a document entitled "Final Judgment," which states

that "[t]he Court enters final judgment pursuant to FRCP 58." (ER 1.)[1]

Respondent Revelstoke Investment Corp., Inc. owns real estate in Texas. Revelstoke is one of several corporations established by the late Jose Y. Campos, Sr. to hold investments for him and his family. Mr. Campos was a Filipino businessman who established successful pharmaceutical companies in the Philippines and made investments both in the Philippines and abroad.

This case arises because, in April 2005, petitioners registered the 1995 Class Judgment in the U.S. District Court for the Northern District of Texas under 28 U.S.C. § 1963 and commenced an enforcement action against Revelstoke and six affiliated corporations (the "Texas Action"). In that case, petitioners alleged that the real estate owned by the corporations belongs to the Marcos Estate and sought to execute on the properties to satisfy the 1995 Class Judgment. Revelstoke and the other corporations vigorously contested the allegations and, as described below, moved to dismiss the Texas Action on the ground that the 1995 Class Judgment was not extended within 10 years of entry and therefore expired and became unenforceable in February 2005 pursuant to Haw. Rev. Stat. § 657-5.

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[1] "ER" cites are to the "Excerpts of Record," which is the term used in the Ninth Circuit to refer to the appellate record filed with the court of appeals.

2. ***The Immediate Enforcement And Appeal of The 1995 Class Judgment.*** Shortly after entry of the 1995 Class Judgment on February 3, 1995, the Class moved for permission to enforce what they recognized to be "the Final Judgment" in their case.[2] On March 14, 1995, the district court granted the Class's motion, directed its clerk to "certify the Final Judgment of February 3, 1995 for transfer to other districts," and ruled that "there is no bar to execution on the Final Judgment . . . notwithstanding the pendency of any posttrial motions or appeals." (ER 16.) Petitioners promptly began to enforce the judgment.

After the district court denied post-trial motions, the Marcos Estate appealed on May 3, 1995, "from the Final Judgment entered in favor of the Plaintiff Class on February 3, 1995." (Doc. 608, Am. Notice of Appeal, *In re Estate*, MDL 840 (D. Haw.).) The Ninth Circuit held that it "ha[d] jurisdiction over the appeal pursuant to 28 U.S.C. § 1291," observing that "[o]n February 3, 1995, the district court entered final judgment in the class action suit" and that "[t]he Estate appeals from this judgment." *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996).

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[2] (Doc. 578, Pls.' Mot. for Order Directing the Clerk to Certify the Final Judgment for Transfer to Other Districts, *In re Estate*, MDL 840 (D. Haw. filed Feb. 28, 1995).)

3. ***The Class's Attempt To Enforce The 1995 Class Judgment Against Respondent.*** In April 2005, the Class commenced the Texas Action by registering the 1995 Class Judgment pursuant to 28 U.S.C. § 1963 and filing an enforcement action in the Texas court against Revelstoke. (ER 43-79, Compl., *Del Prado v. B.N. Dev. Co.*, No. 05-234 (N.D. Tex. filed Apr. 8, 2005).)[3] The Class alleged that the 1995 Class Judgment was "rendered" February 3, 1995. (*Id.* ¶¶ 1, 4, 12.)

Counsel for Revelstoke informed the Class's counsel that Revelstoke would move to dismiss the Texas Action because the 1995 Class Judgment expired February 3, 2005, pursuant to Haw. Rev. Stat. § 657-5. (ER 38.) The Class had never sought or obtained an extension of the 1995 Class Judgment, so it could no longer be enforced under the express terms of the Hawaii statute, which provides:

> "Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. *No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered*

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[3] The original caption of this suit identifies Mariano Pimentel as Class representative. Romulo Del Prado was later appointed Class representative, and the caption was changed accordingly. We use the current caption when referring to this suit.

> *or extended.* No extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered. A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree." Haw. Rev. Stat. § 657-5 (emphasis added).

Without serving or otherwise notifying Revelstoke, the Class moved in the District of Hawaii for an out-of-time "extension" of the 1995 Class Judgment. (ER 17-23.) The court of appeals later characterized the Class's tactic as a "preemptive strike" designed to "pretermit the outcome of Revelstoke's motion to dismiss" the Texas Action and "transfer[ ] the forum for determining the life of the [1995 Class] Judgment . . . to . . . Hawaii." (Pet. App. 10a-11a.)

Upon learning of the Hawaii motion to extend, Revelstoke moved to intervene in the Hawaii district court for the limited purpose of opposing the extension motion. (ER 24-33.) During a hearing days later, Judge Real summarily granted the motion for an "extension" of the 1995 Class Judgment and then denied Revelstoke's motion to intervene. (ER 109-12.) Revelstoke promptly filed a second motion to intervene for the purpose of appealing the extension of the 1995 Class Judgment.

(ER 118-124.) Judge Real immediately denied that motion, too. (ER 125.) Revelstoke timely appealed.

Meanwhile, the Class successfully moved the Texas court to stay consideration of Revelstoke's motion to dismiss the Texas Action on the ground that the validity of the 1995 Class Judgment should be decided by a federal court in Hawaii: "'Since it is a Hawaiian state statute at issue, presumably the Hawaiian Federal Court has more experience in interpreting and applying it than a Texas court.'" (Pet. App. 9a n.4 (quoting Pls.' Mot. to Stay Briefing at 2).)

4. ***The Ninth Circuit's Decision Reversing The District Court.*** On July 31, 2008, the Ninth Circuit held that Revelstoke should have been allowed to intervene in the Hawaii district court to oppose the "extension" of the 1995 Class Judgment. On the merits, the court of appeals held:

> "that HRS § 657-5 means what it says: a judgment expires within ten years unless extended before expiration; that the Hawaii Supreme Court said so in *International Savings & Loan Ass'n v. Wiig*, 921 P.2d 117 (Haw. 1996); and that the district court clearly erred in resurrecting the [1995 Class] Judgment in 2006 after it expired in February 2005." (Pet. App. 14a.)

The court of appeals emphasized that the Hawaii statute "plainly states that all judgments are extinguished after ten years unless timely renewed" (*id.*), and that the Hawaii Supreme Court has confirmed this plain-meaning interpretation:

> "The Hawai'i Supreme Court has authoritatively declared that the burden is on the judgment creditor to seek judicial extension of the judgment prior to expiration of the ten-year period, and that if she fails to secure an extension within the ten years, 'the judgment and all the rights and remedies appurtenant to that judgment terminate.'" (Pet. App. 14a (quoting *Wiig*, 921 P.2d at 119).)

The court of appeals also rejected the Class's argument that the ten-year period was tolled until the 1995 Class Judgment was affirmed on appeal:

> "HRS § 657-5 provides that the limitations period begins to run on 'the date the original judgment or decree was rendered.' It does not say ten years from the date of entry *plus* however much time it takes to appeal." (Pet. App. 18a (quoting § 657-5) (emphasis in original).)

On September 11, 2008, the court of appeals unanimously denied the Class's petition for rehearing and rehearing *en banc*. (Pet. App. 34a.) None of the 28 judges eligible to vote for rehearing did so. (*Id.*) In their rehearing petition, the Class raised for the first time two questions that are presented in the petition for certiorari.[4]

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[4] Apart from rearguing issues previously presented to the court of appeals, the Class contended for the first time in its petition for rehearing (1) that the interpretation of Haw. Rev. (...continued)

5. ***Class Counsel's Efforts To Relitigate The Issues By Certification To The Hawaii Supreme Court In Another Case.*** Shortly after the Ninth Circuit ruled that the 1995 Class Judgment had expired, Class Counsel appeared before Judge Real in two other actions being handled in MDL 840: *Sison v. Marcos*, Civ. A. No. 86-225 (D. Haw.), and *Piopongco v. Marcos*, Civ. A. No. 87-138 (D. Haw.) (collectively, "*Sison-Piopongco*"). Class Counsel obtained an order from Judge Real in *Sison-Piopongco* "certifying" to the Hawaii Supreme Court the same question about the application of Haw. Rev. Stat. § 657-5 that the Ninth Circuit decided below against the Class in this case.

The certification order was issued in the following way: On October 2, 2007, just before the tenth anniversary of their own judgment, the *Sison-Piopongco* plaintiffs moved for an extension under § 657-5.[5] That motion was filed by Paul Hoffman,

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Stat. § 657-5 should be certified for decision to the Hawaii Supreme Court, and (2) that the limitations period under § 657-5 did not start running until December 6, 1995 because the 1995 Class Judgment was not really a final judgment under FRCP 58.

[5] The *Sison-Piopongco* plaintiffs "pursue[d] their claims directly" rather than as part of the Class, and their claims for compensatory damages "were tried separately" from those of the Class. *Hilao v. Estate*, 103 F.3d 789, 791 (9th Cir. 1996). Judge Real entered final judgment in *Sison-Piopongco* in August 1995, largely denying the plaintiffs' damages claims. The court of appeals reversed and remanded, *id.* at 793-94, and a new judgment was entered in favor of the *Sison-Piopongco* plaintiffs on October 3, 1997, awarding Sison $750,000 and Piopongco $250,000.

who represented the *Sison-Piopongco* plaintiffs but to our knowledge does not represent the Class. The motion languished for almost a year. But on September 12, 2008, the day after the Ninth Circuit denied the Class's petition for rehearing in this case, Judge Real heard the motion. At that hearing, Class Counsel appeared but Mr. Hoffman did not. Although no party had ever asked for certification of any question to the Hawaii Supreme Court, the district court suggested certification concerning § 657-5. Class Counsel responded: "Yes, Your Honor, that would be an excellent approach." (Tr. of Hr'g at 4:13-18 (D. Haw. Sept. 12, 2008).[6])

The courtroom clerk then spoke by telephone with Mr. Hoffman, who "didn't have notice of the hearing" and was "on vacation." (*Id.* at 5:19 – 6:2, 7:1-3.) Mr. Hoffman asked for a chance to brief the issues, but Judge Real refused: "Mr. Van Dyke [who argued for the Class in the court of appeals] is here for the class, and he indicates that he's amenable to the presentation to the Hawai'i Supreme Court." (*Id.* at 7:12-21.) It was then agreed that Class Counsel would "prepare . . . suggested language" for transmission to the Hawaii Supreme Court. (*Id.* at 9:3-10.)

The "language" prepared by Class Counsel and certified by Judge Real seeks the Hawaii Supreme

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[6] The transcript is available on the PACER website for the District of Hawaii, https://ecf.hid.uscourts.gov/cgi-bin/login.pl (last visited Mar. 8, 2009), under case number 03-11111 (which designates the MDL 840 docket entries that are available electronically).

Court's opinion on a question not presented by the *Sison-Piopongco* case, but which directly implicates the 1995 Class Judgment: whether *any* appellate review of a judgment on appeal tolls the ten-year period under § 657-5.[7] *Sison-Piopongco* does not present this broad issue because the original judgment in those cases had been reversed, and the motion to extend was filed less than ten years after entry of the *new judgment* on remand. In this case, by contrast, the 1995 Class Judgment was affirmed on appeal without modification.

Petitioners inaccurately assert that the Hawaii Supreme Court "has agreed to decide" the certified questions. (Pet. 19.) To the contrary, that court invited briefing of the issues but expressly stated that it was not yet "determining whether this court will answer the question." (Pet. App. 32a.) Revelstoke was granted leave and has filed an *amicus* brief to oppose the Class's efforts to obtain an advisory opinion on a hypothetical question that is not presented by the case and that would interpret § 657-5 differently from the carefully-reasoned decision of the Ninth Circuit.[8]

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[7] The certified question asks whether the limitations period under § 657-5 "begin[s] after the appellate process is completed." (Pet. App. 28a.)

[8] Order, *Estate of Francisco Sison v. Estate of Ferdinand E. Marcos*, No. 29372 (Haw. Feb. 17, 2009).

REASONS FOR DENYING THE WRIT

The petition for certiorari presents no issue worthy of this Court's review. Petitioners seek to use the certiorari procedure for the inappropriate purposes of contesting the Ninth Circuit's sound and straightforward interpretation of Hawaii state law and seeking a "deferral" from this Court while they try to relitigate in the Hawaii Supreme Court the same issues that they tendered to the federal courts below.

Furthermore, the other issues raised by petitioners were not presented to or decided by the courts below. None of the questions presents a conflict among the circuits or a departure from any decision of this Court.

I. THE STATE LAW ISSUE DECIDED BY THE COURT OF APPEALS WARRANTS NEITHER REVIEW NOR "DEFERRAL."

Review is inappropriate — as is any delay in disposing of the petition — because the court of appeals decided an issue of state law. The Class concedes that the court below "bas[ed] its ruling entirely on a Hawai'i statute," but challenges "[t]he court of appeals' interpretation and application of [Haw. Rev. Stat. § 657-5]." (Pet. 3-4.) The Ninth Circuit's interpretation of Hawaii law would not warrant review or deferral even if it were not so manifestly correct.

1. This Court "accord[s] great deference to the interpretation and application of state law by the Courts of Appeals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816 n.12 (1984); *see also, e.g., McMillian v.*

Monroe County, Ala., 520 U.S. 781, 786 (1997). Only "in exceptional cases" does this Court review "the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Petitioners fail to identify any respect in which the interpretation and application of Haw. Rev. Stat. § 657-5 by the court of appeals raises "exceptional" circumstances calling for special review.

2. This Court should not "hold" the petition on the asserted ground that the Hawaii Supreme Court "has agreed to decide" the questions certified by Judge Real in the *Sison-Piopongco* case. (Pet. 19.)

As an initial matter, the Hawaii court has not "agreed to decide" anything; rather, it invited briefing before "determining whether [it] will answer the [certified] question." (Pet. App. 32a.) It may well decline to answer the question that is not genuinely presented by the *Sison-Piopongco* case: whether the Ninth Circuit was correct that the 10-year time limit for enforcement of a judgment under Haw. Rev. Stat. § 657-5 is not tolled by appellate proceedings resulting in affirmance of the judgment.

Indeed, answering that hypothetical question would be inconsistent with the Hawaii Supreme Court's self-recognized "'duty'" not to "'declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *State v. Matavale*, 166 P.3d 322, 342 n.15 (Haw. 2007) (quoting *Wong v. Bd. of Regents, Univ. of Haw.*, 616 P.2d 201, 204 (Haw. 1980)). An answer to that

question could not affect the *Sison-Piopongco* plaintiffs' extension motion.[9] When the Hawaii Supreme Court perceives that a tendered questions is hypothetical after briefs are submitted, it does not answer the question. *See Matsuura v. E.I. Du Pont de Nemours & Co.*, 73 P.3d 687, 706 (2003) ("insofar as [a] certified question d[id] not appear to be 'determinative of the cause,' it was inappropriate for certification under HRAP Rule 13" and the court "decline[d] to answer it").[10]

3. Petitioners mischaracterize the authority that they offer to support their request that this Court "defer or hold decision" on the petition. The cases they cite involve the different situation in which "awaiting the position of a state's highest court" may clarify whether this Court has *jurisdiction* to review a decision. (Pet. 22.)

In *Lynum v. Illinois*, 368 U.S. 908 (1961), and *Herb v. Pitcairn*, 324 U.S. 117 (1945), this Court did not "hold" a certiorari petition because a ruling in *another* case might produce a new interpretation of

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[9] As previously noted, the original August 1995 judgment in *Sison-Piopongco* was *reversed* on appeal in December 1996, *see Hilao*, 103 F.3d F.3d 789 at 793-94, and the new judgment was entered on remand in October 1997. The *Sison-Piopongco* plaintiffs' extension motion was filed October 2, 2007, less than ten years after entry of the new judgment on remand.

[10] Moreover, as explained below (*see infra* at 15-17), the decision of the court of appeals on the first certified question follows two unanimous Hawaii Supreme Court opinions, which makes certification unnecessary. *See* Haw. R. App. P. 13 (limiting certification to situations where "there is no clear controlling precedent in the Hawai'i judicial decisions").

state law. This Court instead deferred consideration because it was unclear whether the decision on which certiorari was sought rested on "an adequate and independent state ground," so that explanation by the state supreme court would clarify "whether the decision of [a] federal [claim] . . . was necessary to the judgment rendered." *Lynum*, 368 U.S. at 908; *Herb*, 324 U.S. 128.

Here, by contrast, (i) petitioners seek "deferral" based on a possible decision in a different case pending in state court, (ii) the decision below was rendered by a federal appellate court, not the state supreme court, (iii) that decision expressly turns on the interpretation and application of a state statute, and (iv) petitioners concede that the decision was based "entirely" on state law (*see* Pet. 3). Moreover, no case cited by petitioners involves a situation where, as here, the delay is sought in aid of efforts to relitigate the same issues decided by the court below.

4. Petitioners also disregard that the Ninth Circuit's interpretation of Haw. Rev. Stat. § 657-5 accords not only with the plain meaning of the statute, but also with two unanimous opinions of the Hawaii Supreme Court holding that § 657-5 imposes a strict limitations period that runs from the date a judgment is entered by the trial court.

Brooks v. Minn, 836 P.2d 1081 (Haw. 1992), holds that a judgment is "rendered" under § 657-5 when it is "entered" on the docket, so "the ten-year [limitations period] runs from the date the judgment was entered." 836 P.2d at 1086-87 & n.10. The judgment in *Brooks* "was filed on February 9, 1981,"

so the judgment creditor "had until February 9, 1991" to enforce it. *Id.* at 1087.[11]

Similarly, *International Savings & Loan Ass'n, Ltd. v. Wiig*, 921 P.2d 117, 118-19 (Haw. 1996), confirms that § 657-5 imposes an unyielding, bright-line limitation rule that allows no exception:

> "HRS § 657-5 places the burden on the judgment creditor to seek judicial extension of the judgment prior to the expiration of the ten year statutory period; otherwise, the judgment is presumed to be 'paid and discharged' as a matter of law." *Id.* at 119.

Wiig emphasizes that "HRS § 657-5 is a statute of repose that compels the exercise of a right within the statutorily defined period of time." *Id.*[12]

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[11] The precise date on which the limitations period began running was important in *Brooks* because the judgment incorporated a promissory note providing for interest from the effective date of the note. The Court ruled that the judgment creditor was "entitled to recover . . . interest as provided in the Note *from the date the [judgment] was entered* on February 9, 1981," not from the date the judgment debtor's right to appeal expired. 836 P.2d at 1087 (emphasis added).

[12] *Wiig* held that the ten-year clock started when a judgment was entered by the trial court on March 8, 1984, not when the time for appeal expired: "[P]ursuant to the plain language of HRS § 657-5, the judgment expired on March 8, 1994 – ten years after the original judgment was rendered." 921 P.2d at 118-19. The judgment creditor argued that a garnishment order obtained months after the judgment's entry "'tolled' the life of the judgment beyond the ten year period." *Id.* The Hawaii Supreme Court disagreed, rejecting the view that (...continued)

Thus, "[i]f the judgment creditor fails to secure the extension within the ten years, the judgment and all the rights and remedies appurtenant to that judgment terminate." *Id.*[13]

Citing *Wiig*, the Ninth Circuit held that Haw. Rev. Stat. § 657-5 "means what it says: a judgment expires within ten years unless extended before expiration." (Pet. App. 14a.) In doing so, the court of appeals applied the plain language of § 657-5, which "provides that the limitations period begins to run on 'the date the original judgment or decree was rendered'" and "does not say ten years from the date of entry *plus* however much time it takes to appeal." (Pet. App. 18a (quoting § 657-5).)

Contrary to petitioners' assertion, the court of appeals did not regard any issue of Hawaii law as "novel." (Pet. 21.) The full sentence quoted by the

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"a garnishment proceeding or any other enforcement action 'tolls' the time limitation imposed by HRS § 657-5." *Id.* at 120.

[13] Further evidencing that the ten-year limit imposed by Haw. Rev. Stat. § 657-5 is unyielding, the Intermediate Court of Appeals of Hawaii recently held that the statute "creates a limitation period that commences on the original judgment's entry date" even when the judgment is partially *reversed* and partially *vacated* on appeal. *Estate of Roxas v. Marcos*, No. 28702, --- P.3d ---, 2009 WL 352878, at *4-5 (Haw. Ct. App. Feb. 12, 2009), *mot. for reconsideration denied*, 2009 WL 550882, at *1 (Haw. Ct. App. Mar. 2, 2009) (table).

In contrast, the recent Hawaii opinion cited by the Class, *Beecher Limited v. Alvarez & Marsal North America, LLC*, No. 28011, 2008 WL 616287, 187 P.3d 593 (Haw. App. Mar. 7, 2008) (table) (*see* Pet. 21-22 n.9), does not apply Haw. Rev. Stat. § 657-5 and is an "unpublished dispositional order" that "shall not be cited in any other action or proceeding," Haw. R. App. P. 35(c)(1).

Class describes only the facts of this case as "novel." (*See* Pet. App. 2a ("This appeal requires us to consider a novel situation involving the registration of a federal judgment.").)

II. THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PROPERLY RAISED OR PASSED UPON BELOW.

The petition overlooks that this Court ordinarily does not review questions that were not properly presented to, or decided by, the courts below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking . . . the judgment [below] when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

1. To have properly presented an issue to the courts below, petitioners must have done so before the court of appeals ruled on the merits. Arguments are "waived" when they are presented for the first time in a rehearing petition in the absence of good grounds for the delay. *See, e.g., Picazo v. Alameida*, 366 F.3d 971, 972 (9th Cir. 2004); *Talk of the Town v. Dep't of Fin. & Bus. Servs.*, 353 F.3d 650, 650 (9th Cir. 2003). This Court recognizes the same rule: "[i]t has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'Connor, J., concurring in the denial of the petition for certiorari),

see also Hoover v. Ronwin, 466 U.S. 558, 574 (1984) (declining to address respondent's constitutional argument that was "made . . . for the first time in . . . response to petitioners' motion for rehearing in the Court of Appeals"; the "failure to raise this issue in a timely manner precludes our consideration").

2. None of the questions presented by petitioners was properly raised before or decided by the Ninth Circuit. Until its petition for certiorari, the Class never argued that "[f]ederal statutory or common law" creates a "federal law accrual rule" that determines when the limitations period under Haw. Rev. Stat. § 657-5 began running for the 1995 Class Judgment. (Pet. 3-4, 11-19.)[14] In the courts below, petitioners made the different argument that the Supremacy Clause overrides the Hawaii statute.[15] Petitioners appear to have abandoned that argument, perhaps because every court of appeals to

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[14] This is not a situation where a certiorari petition makes a new argument in support of a claim raised below. *Compare Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (petitioners who claimed "Takings Clause" violation in lower courts could make "regulatory taking argument" and "physical taking argument" in this Court, even though it was "unclear" if former was raised below, because these were "separate *arguments* in support of a single claim") (emphasis in original). Although the Class argued below that the limitations period did not start until after affirmance of the 1995 Class Judgment and cited some of the cases it cites here (*see* Class Br. at 2, 19-24, *Hilao v. Estate of Ferdinand Marcos*, No. 06-16301 (9th Cir. filed Aug. 25, 2006) ("Class 9th Cir. Br.")), the Class never raised a claim based on "[f]ederal statutory or common law" and never suggested the existence of a "federal law accrual rule." (Pet. 3-4, 11-19.)

[15] (*See* Pet. App. 14a; Class 9th Cir. Br. at 2, 31.)

consider the issue has held that, pursuant to FRCP 69(a)(1), the forum state's law limits the period for enforcing a federal court judgment where no federal statute imposes a deadline. *See, e.g., Andrews v. Roadway Express*, 473 F.3d 565, 567, 569 n.4 (5th Cir. 2006) (Texas law); *Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 408 & n.23 (5th Cir. 2001) (Louisiana law); *United States v. Fiorella*, 869 F.2d 1425, 1426 & n.5 (11th Cir. 1989) (Alabama law); *Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358, 360 (9th Cir. 1966) (Washington law).[16]

3. Petitioners also concede that they did not request certification of state law issues to the Hawaii Supreme Court or present an argument based on FRCP 58 until their "motion for rehearing" in the court of appeals. (Pet. 4, 10.) It was petitioners who tendered the interpretation of Haw. Rev. Stat. § 657-5 to the courts below, and they never suggested "certification" to the state courts until they had fully litigated the issue and lost. Similarly, petitioners treated the 1995 Class Judgment as a final judgment under Rule 58 from 1995 to 2008 — again, until they lost in the court below and seized on the new contention that it was not really a final judgment.

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[16] The Class erroneously implies that a federal judgment "on a federal cause of action" is subject to limitations principles different from those that apply to a federal judgment on a state cause of action. (Pet. 14.) Rule 69(a)(1) makes no such distinction. Every federal court judgment is subject to state law for enforcement purposes (absent a specific provision of federal law to the contrary), regardless of the cause of action on which the judgment is based.

III. THE FEDERAL LAW ISSUES RAISED IN THE PETITION INVOLVE NO CONFLICT AMONG THE COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT.

The Ninth Circuit's application of Haw. Rev. Stat. § 657-5 does not conflict with a decision of another court of appeals or of this Court with respect to either federal issue that petitioners raise.

A. The Decision Below Does Not Conflict With Any Federal Decision Addressing Time Limitations On the Enforceability of Federal Court Judgments.

Petitioners argue that the Ninth Circuit's application of § 657-5 to the 1995 Class Judgment conflicts with decisions of other courts of appeals and of this Court holding that federal law determines when a state limitations period begins running on a federal court judgment. (Pet. 3-4, 11-19.) None of the opinions cited by the Class so holds, and none establishes or applies a "federal law accrual rule" for state limitations periods on judgments. (Pet. 4.)

As the Ninth Circuit correctly observed, FRCP 69(a)(1) provides that "the procedure on execution is to be in accordance with the procedure of the state in which the district court is located." (Pet. App. 15a.)[17]

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[17] FRCP 69(a)(1) states: "A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

Under this principle, and under the Rules of Decision Act, 28 U.S.C. § 1652, the forum state's law limits the life of a judgment "unless a timeliness rule drawn from elsewhere in federal law should be applied." (Pet. App. 15a.) Petitioners disregard this well-settled principle and rely on cases addressing questions other than enforcement of judgments rendered by federal courts.

Thus, petitioners make the uncontroversial and irrelevant point that "Federal law has always controlled when a federal judgment is deemed 'final' for purposes of appeal." (Pet. 11.) Similarly, they cite cases holding that the "accru[al]" of federal *causes of action* — not judgments — is determined by "federal common law." (*Id.*)[18] The question decided below (and presented here) is not the time of accrual of the petitioners' causes of action, which were ultimately upheld in the 1995 Class Judgment, but the time period within which that judgment could be enforced under Hawaii state law, which controls under FRCP 69(a) and the Rules of Decision Act.

Petitioners come closer to addressing relevant points when they contend that three decisions involving limitation periods on enforcement of

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[18] (*See* Pet. 11-12 (citing *Wallace v. Kato*, 549 U.S. 348, 388 (2007) ("the accrual date of a § 1983 cause of action is a question of federal law"); *Romero v. Allstate Corp.*, 404 F.3d 212, 221 (3d. Cir. 2005) ("The date of accrual of the ERISA non-fiduciary duty claims asserted is determined as a matter of federal common law."); *Tolle v. Carroll Touch*, 977 F.2d 1129, 1138 (7th Cir. 1992) ("we look to federal common law for purposes of deciphering the accrual date of a cause of action under a federal statute")).)

judgments conflict with the decision below. (Pet. 12-15, 19.) The court of appeals distinguished two of these cases: *Borer v. Chapman*, 119 U.S. 587 (1887), and *Home Port Rentals, Inc. v. International Yachting Group, Inc.*, 252 F.3d 399 (5th Cir. 2001). (Pet. App. 19a.) Petitioners did not cite the third case, *Jalapeno Property Management, LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001), until their certiorari petition. None of the three cases holds that a state statute limiting lives of judgments "does not begin to run on a federal judgment until all appeals are final" (Pet. 3), and there is no conflict between those cases and the decision below.

1. ***Borer***

In *Borer*, the trial court entered a judgment on April 19, 1872, which this Court "reversed and remanded." 119 U.S. at 593, 601-02. A corrected, final judgment was entered "on December 18, 1878," and was made *nunc pro tunc* "as of July 10, 1871." *Id.* at 596, 602. This Court held that the limitations period for enforcement did not begin running on July 10, 1871 because "[t]he date of that entry is by a fiction of the law" and "the right of [the judgment creditor] to enforce th[e] judgment" should run from the entry of the new judgment on remand that was "actually entered on December 18, 1878." *Id.* at 602.

In contrast, the 1995 Class Judgment (i) was never suspended, reversed, or vacated, (ii) is not a *nunc pro tunc* judgment, (iii) was ruled immediately enforceable by the rendering court, and (iv) was enforced by the Class "immediately" after entry (Pet. App. 18a). Nothing in *Borer* suggests that "the state time period to enforce a federal judgment d[oes] not begin to run until all appeals [a]re completed." (Pet.

12.)[19] *Borer* also antedated the adoption of FRCP 69(a)(1) and therefore did not address that rule's principle that state law governs enforcement of judgments.

2. *Home Port Rentals*

Petitioners are also incorrect in asserting that the decision below conflicts with *Home Port Rentals*. That case does not apply a federal law rule that limitations periods for enforcing judgments are tolled until "all appeals are completed or the time for appeal has expired." (Pet. 13.) Instead, *Home Port Rentals* holds that, where a "live" (*i.e.*, unexpired) judgment was registered in Louisiana under 28 U.S.C. § 1963, Louisiana's limitations period governed enforcement of the judgment in that state and began running on the date of registration.

The judgment in *Home Port Rentals* was entered by the South Carolina federal court on March 20, 1989, was affirmed by the Fourth Circuit on April 2, 1992, and was registered in a Louisiana federal court on March 17, 1999. 252 F.3d at 402. On the date of registration, the judgment was "enforceable" in "both the rendering and the

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[19] The enforcement action in *Borer* "was filed August 20, 1879," within one year after entry of the corrected, final judgment. 119 U.S. at 601. The Court thus did not need to consider application of a Minnesota statute providing that enforcement actions be "commenced within one year from the time the claim is allowed or established." *Id.* The Court noted that "[w]hether that statute has any application to this bill in equity . . . is a question which need not be considered or decided." *Id.* at 603

registration jurisdictions," as each had a ten-year limitations period. *Id.* at 403-04 & nn. 4-5.

The Fifth Circuit held that Louisiana's limitations period governed pursuant to the final sentence in § 1963, which states: "'A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.'" *Id.* at 406 (quoting § 1963). The same sentence was decisive in determining "*when* Louisiana's [limitations] clock started to tick": "enforcement proceedings following registration are governed exclusively by the limitation rules of the state in which the registration district is situated," and "in Louisiana, that period starts to run on the date the judgment is *registered*." *Id.* at 406-08 & n.23 (citing Fed. R. Civ. P. 69) (emphases in original).

Petitioners quote the words "clearly specious" from *Home Port Rentals* out of context. (Pet. 13.) The opinion uses those words in discussing which state's law applied, not in regard to when the applicable state limitations period began running. 252 F.3d at 406. Because the judgment had been registered in Louisiana before it expired in South Carolina, it could be "enforced within the limitation period of [Louisiana] even though the time for enforcement ha[d] run in [South Carolina]" after the registration in Louisiana. *Id.* The judgment debtor's "contention that South Carolina's statute of limitations" controlled enforcement in Louisiana was "clearly specious" because the judgment was "live" when it was registered (unlike the expired 1995 Class Judgment when it was registered in Texas) and the governing Louisiana statute did not look to

the rendering jurisdiction's limitations period (unlike the borrowing provision governing the Texas Action, Tex. Civ. Prac. & Rem. Code § 16.066(a)). *Home Port Rentals*, 252 F.3d at 406.

3. *Jalapeno*

Nor does the decision below conflict with *Jalapeno*. The Class asserts that *Jalapeno* "appl[ied] federal common law" to hold that state limitations periods on judgments "do not begin [to run] until after the mandate issues following an appeal." (Pet. 13.) *Jalapeno* does not hold that an appeal must end before a state limitations period on a judgment begins running, much less apply "federal common law" to that effect. Instead, *Jalapeno* addresses the different question whether a limitations period on enforcement began running upon entry of a judgment that remained "'subject to revision' by the district court" and that was neither final nor appealable. 265 F.3d at 513-14 (quoting FRCP 54(b)).

Whereas the judgment in *Jalapeno* "lacked a certification of finality," *id.* at 508, 511, the 1995 Class Judgment is titled "Final Judgment" and by its terms "enters final judgment pursuant to FRCP 58" in favor of the Class (ER 1). Petitioners try to sidestep these points by arguing that the 1995 Class Judgment was only "signed" February 3, 1995 (*e.g.*, Pet. 5-7, 9) and that it was not really "entered" until December 6, 1995 (*e.g.*, Pet. 5, 7). They ignore that the top-right corner of the first page of the 1995 Class Judgment (ER 1) and the pertinent docket entry (ER 181) each confirm that the judgment was entered February 3, 1995.

Petitioners likewise ignore that the 1995 Class Judgment entered February 3, 1995 was appealed as a final judgment in 1995, was held to be such by the Ninth Circuit, and was enforced by petitioners as a final judgment immediately after entry.[20] In *Jalapeno*, by contrast, the entry of a non-final judgment subject to revision precluded an appeal.[21]

B. Petitioners' New Position That The 1995 Class Judgment Is Not A Final Judgment Is Baseless, Contradicts Their Longstanding Position, Is Supported By No Federal Appellate Decision, And Would Not Change The Result Even If It Were Correct.

Petitioners' past positions and conduct belie their new contention that the 1995 Class Judgment

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[20] The Marcos Estate appealed "from the Final Judgment entered in favor of the Plaintiff Class on February 3, 1995" (Doc. 608, Am. Notice of Appeal, *In re Estate*, MDL 840 (D. Haw. filed May 3, 1995)) – *i.e.*, from the 1995 Class Judgment. The court of appeals determined that the "final judgment in the class action suit" was entered "[o]n February 3, 1995" and held that it "ha[d] jurisdiction over the appeal pursuant to 28 U.S.C. § 1291," *Hilao*, 103 F.3d 767 at 771-72. Far from disputing these points, petitioners moved on February 28, 1995 for authorization to enforce the 1995 Class Judgment immediately, their motion was granted, and they continued enforcing the judgment while the Estate's appeal was pending. *See, e.g.*, *Hilao v. Estate of Marcos*, 95 F.3d 848, 850 (9th Cir. 1996); *In re Estate of Marcos*, 963 P.2d 1124, 1128 (Haw. 1998).

[21] The Sixth Circuit ruled that the judgment in *Jalapeno* did not become final "until the termination of the litigation against the remaining defendants," which did not occur "until after this court had issued its second mandate . . . which concluded the litigation as to 'the rights and liabilities of all the parties.'" 265 F.3d at 514 (quoting Fed. R. Civ. P. 54(b)).

entered on February 3, 1995 was not really a final judgment and that the final judgment was actually entered on December 6, 1995. (Pet. 23-29.) This remarkable revisionist history ignores that petitioners themselves treated the 1995 Class Judgment as a final judgment for many years: Petitioners moved for authorization to begin enforcing it in February 1995, and their motion was granted two weeks later; petitioners enforced it as soon as they were authorized to do so and continued doing so while it was on appeal[22]; the Ninth Circuit held that it was a final judgment in 1996 when it exercised appellate jurisdiction and affirmed it, *Hilao*, 103 F.3d 767 at 772; and petitioners registered it and filed the Texas Action in 2005 based on the specific allegation that it was an enforceable final judgment.

Petitioners do not explain why the fact-bound question whether the judgment was entered February 3, 1995 or December 6, 1995 warrants review. Nor do they acknowledge that it would make no difference even if their new position were correct: They never registered or sought to extend the

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[22] By the time the Marcos Estate appealed the 1995 Class Judgment, the Class had registered the judgment and begun executing on it, both in Hawaii and in other jurisdictions, and the Class continued such enforcement efforts while the appeal was pending. *See, e.g.*, *Hilao*, 95 F.3d at 850 (in May 1995, the Class "registered its Hawai'i judgment against the Estate in the Central District of California" and served "writs of execution" on banks in Los Angeles); *In re Estate of Marcos*, 963 P.2d at 1128 (in November 1995, the district court "grant[ed] the [Class's] motion for a writ of execution," holding that a car "was to be seized and sold to satisfy a portion of the [Class's] judgment against the Marcos Estate").

purported December 1995 judgment, so it would have expired and become unenforceable more than three years ago.[23]

In any event, their new position is not correct. The district court's docket reflects that the "separate document" and other formal requirements for entering judgment under FRCP 58 were all satisfied as of February 3, 1995:

- The first page of the 1995 Class Judgment states that "[t]he Court enters final judgment pursuant to FRCP 58." (ER 1.)

- The 1995 Class Judgment was entered on the district court's docket on February 3, 1995 as follows: "FINAL JUDGMENT — on behalf of Plaintiffs — **REAL**." (ER 181, Doc. 568, MDL 840 (D. Haw.).)

- The 1995 Class Judgment is "a separate document" (*i.e.*, a document "distinct from any opinion or memorandum") and the district court's clerk "promptly prepare[d],

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[23] Petitioners assert that because they registered the 1995 Class Judgment in April 2005, less than 10 years after December 6, 1995, they should be allowed to enforce the December 1995 judgment. (Pet. 23, 29.) But petitioners registered only the 1995 Class Judgment entered February 3, 1995, not the supposed December 1995 judgment. In any event, petitioners did not even mention the possibility of registering the December 1995 judgment until after the Ninth Circuit ruled against them in July 2008. By then, no December 1995 judgment could be registered because it was never extended under Haw. Rev. Stat. § 657-5 and therefore would have expired in December 2005.

> sign[ed], and enter[ed] the judgment" in the court's "civil docket." Fed. R. Civ. P. 58(a), (b)(1), (c)(2) & advisory committee's note.

Nor do petitioners identify any conflict between the decision below and other federal decisions applying FRCP 58. They cite no federal decision suggesting that Rule 58 may be applied retrospectively to undo a final judgment that was fully litigated on appeal, affirmed, and enforced against the judgment debtor. Indeed, this Court has held that the "sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978).

There is no conflict between the decision below and *United States v. Indrelunas*, 411 U.S. 216, 220 (1973), which also recognized that Rule 58's formalities were designed to cure the "considerable uncertainty over what actions of the District Court would constitute an entry of judgment" for purposes of appeal. *Indrelunas* held that a docket entry recording that the jury had entered a verdict was not an entry of judgment so that the Government's notice of appeal filed after issuance of separate, written "formal judgments" more than eight months later was timely. *Id.* at 218-19, 221. The same procedure was followed in this case: The docket recorded a jury verdict for the Class on January 18, 1995, and a separate, written document entitled "Final Judgment" dated February 3, 1995, was signed by Judge Real, endorsed by the clerk, and entered on the docket. (ER 177, Doc. 562, MDL 840 (D. Haw.);

ER 181, Doc. 568, MDL 840 (D. Haw.).) Notably, petitioners' list of relevant document entries (Pet. 26-27) omits docket entries showing that the 1995 Class Judgment was a final judgment upon entry, undermining their assertion that "the judgment was not in a form to be enforced until December 6, 1995." (Pet. 29.)[24]

Nor does the decision of the court of appeals conflict with FRCP 54(b) or any federal decision applying it. In arguing that the 1995 Class Judgment was interlocutory because it did not embrace the claims of other parties to the case, petitioners confuse the case brought by the Class (Civ. A. No. 86-390, D. Haw.) with other cases that were handled under the multi-district procedures in MDL 840 (such as *Sison-Piopongco*) in which final judgment was entered later.

Because the 1995 Class Judgment fully adjudicated the claims brought by the Class in their particular case, Judge Real expressly "enter[ed] final judgment pursuant to FRCP 58 in favor of 135 randomly selected Class Claims and the Plaintiff Class" in Civil Action No. 86-0390. (ER 1.) It bears repeating that petitioners not only acquiesced in entry of that judgment, but successfully moved for an order that enabled them to enforce it immediately.

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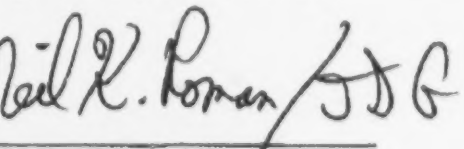
[24] Petitioners omit: (i) the Class's motion of February 28, 1995 for authorization to enforce the judgment immediately (ER 182), (ii) Judge Real's order of March 14, 1995 authorizing immediate enforcement of the judgment (ER 15-16), and the notice of appeal from the judgment filed by the Marcos Estate on May 1, 1995 (ER 185).

Neither of the cases involving FRCP 54(b) cited by petitioners casts any doubt on the finality of the 1995 Class Judgment. (Pet. 28.) *Reiter v. Cooper*, 507 U.S. 258, 270 (1993), simply held that a judgment entered on a plaintiff's claims is unappealable where the defendant's counterclaims remain unadjudicated and the court has not made the "express determination" required by Rule 54(b). And *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984), addresses the appealability of a case that was consolidated with another case for all purposes — not merely for multi-district proceedings or for trial. If petitioners believed that the enforcement and appeal of the 1995 Class Judgment soon after its entry was inconsistent with the Ninth Circuit's guidance in *Huene*, they should have raised that point below over a decade ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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